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No. 82-974

In the Supreme Court of the United States

OCTOBER TERM, 1982

ELMER H. THOMASSEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners seek review of the court of appeals' denial of their motion to recall the mandates in three related appeals arising out of a tax collection suit against petitioners Elmer and Joan Thomassen. The court of appeals dismissed the appeals for failure to prosecute.

The pertinent facts are as follows: The United States brought this action in the United States District Court for the Central District of California to reduce to judgment tax assessments in the amount of $428,669.58 against petitioners Elmer and Joan Thomassen, to set aside as fraudulent certain conveyances of real property by them to the other three petitioners (all of whom are close relatives of Elmer and Joan Thomassen), and to foreclose federal tax liens

against the properties in question (Pet. App. A-12, A-32). All petitioners other than George Thomassen (Elmer's brother) defaulted before the district court (*id.* at A-40). That court found that Elmer Thomassen is an orthopedic surgeon; that he and his wife Joan incurred substantial liabilities for unpaid federal income taxes in each of the years 1965-1971; that several substantial medical malpractice lawsuits were filed against Elmer Thomassen during the period 1970-1972; that one of those lawsuits resulted in a 1973 judgment against Elmer Thomassen in the amount of $50,000; that Elmer and Joan Thomassen made five conveyances of real property in 1972 to the other three petitioners, all of which "lacked any economic reality" and were fraudulent as to creditors under state law; that petitioner Elmer Thomassen between 1969 and 1972 placed various personal and business assets under the names of third parties and transferred funds to a bank account in Switzerland; and that Elmer and Joan Thomassen were also liable for California state taxes and interest in the amount of $107,378.49 as of April 3, 1979 (*id.* at A-33 to A-44). Accordingly, the district court entered judgment, holding Elmer and Joan Thomassen liable to the United States in the amount of $428,197.03 as of June 4, 1979; setting aside the conveyances in question; foreclosing federal tax liens against the real property in question; and providing for the sale of the properties and distribution of the sale proceeds (*id.* at A-12 to A-25).

Petitioners thereafter filed three separate appeals from the judgment, designated by the court of appeals as Nos. 79-3596 and 79-3783 (consolidated by the court of appeals), and No. 79-3562 (Pet. App. A-5, A-9). With respect to No. 79-3562, the clerk of the court of appeals, on March 3, 1980, informed John Matonis, counsel for the sole appellant, George Thomassen, that he had failed to timely designate and order a trial transcript as required by local rules, and

warned him that his continued failure to do this could cause the appeal to be dismissed for want of prosecution (Pet. App. A-9; App. A, *infra*, 1a-2a). Nearly eight months later, on November 4, 1980, the court of appeals granted George Thomassen an extension to November 25, 1980, to have the district court file the certificate of record for that appeal (App. B, *infra*, 5a).[1] As of April 30, 1981, more than five months after expiration of the extension, the certificate of record had still not been filed. Accordingly, on that date, the court of appeals dismissed No. 79-3562 for failure to prosecute the appeal (Pet. App. A-9).

With respect to Nos. 79-3596 and 79-3783, petitioner Elmer Thomassen filed a motion with the court of appeals to proceed on appeal in forma pauperis in order to have the transcripts ordered at government expense. The court of appeals denied the motion on August 25, 1981, and petitioners were ordered to arrange with the district court for the filing of the certificates of record in these appeals within 21 days (Pet. App. A-7). More than seven months after the expiration of the 21-day period, on May 4, 1982, the court of appeals dismissed these appeals for failure to process them to hearing (Pet. App. A-5 to A-6).

Petitioners moved to recall the mandates of the court of appeals in all three appeals, urging that any failure to process the appeals was the result of errors committed by the district court and its court reporters (Pet. App. A-53 to A-58). The court of appeals denied the motion on June 15,

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[1]Under the rules of the court of appeals, the filing of the certificate of record by the trial court clerk with the clerk of the court of appeals indicates that the record is ready for the purposes of appeal. This certificate, however, cannot be filed until the trial court clerk receives either the trial transcript or formal notice that no trial transcript will be ordered. See Rule 4(f), Rules of the Ninth Circuit. The appellants are responsible for ordering the trial transcript. Rule 4(c). Here, petitioners were the appellants in all three appeals.

1982 (Pet. App. A-4). Petitioners filed a petition for rehearing of their motion to recall the mandates, with a suggestion for rehearing en banc (Pet. App. A-52 to A-73). On August 20, 1982, the court denied the petition (*id.* at A-2).

Although an appellate court has within its discretion the inherent power to recall its mandates, there "must be special reason, 'exceptional circumstances,' in order to override the strong policy of repose, that there be an end to litigation." *Greater Boston Television Corp.* v. *FCC*, 463 F.2d 268, 278 (D.C. Cir. 1971), citing *Hines* v. *Royal Indemnity Co.*, 253 F.2d 111, 114 (6th Cir. 1958). See also *Powers* v. *Bethlehem Steel Corp.*, 483 F.2d 963 (1st Cir. 1973). Petitioners have shown no cause whatsoever, much less "exceptional circumstances," that would justify such extraordinary relief, or show an abuse of discretion by the court of appeals. The basis for their petition to this Court, and their motion to recall the mandates below, is a letter from a court reporter, John Murdock, stating that the trial transcript was deposited with the district court on September 19, 1979, and subsequently lost or misplaced by the clerk of that court (Pet. App. A-68). This letter, however, does not justify petitioners' delay. Murdock's trial transcript was one of three transcripts that had to be filed before the appeals could proceed. The others were transcripts of pre-trial and post-trial hearings recorded by reporter Florence Carcia (Pet. App. A-68 to A-69). These pre-trial and post-trial transcripts concededly never were filed because petitioners never paid for their reproduction, as required by Rule 4(c) of the Ninth Circuit Rules (Pet. App. A-74 to A-75). Until the other two transcripts were filed, the district court clerk could not transmit the certificates of record; and it is not material (but perhaps understandable, in view of the petitioners' admittedly extended delay in prosecuting the appeals) that the filed transcript might have been temporarily misplaced in the interim. At all events, the letter does not

establish a causal link between the alleged loss or misplacing of the trial transcript and the failure to prosecute the appeals. What is more, petitioners' long delay in offering any excuse remains unexplained, and of itself constitutes flagrant disregard of the court's processes.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

FEBRUARY 1983

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[2]Petitioners also complain of "ex parte prejudicial communications from the District Court" (Pet. i, 20). These "communications" are a single notation by Carcia, the court reporter responsible for the pre-trial and post-trial transcripts, on a court form in which she explained why the transcripts had not been filed. She stated that petitioner Elmer Thomassen had not paid the $92.50 due for the transcripts, despite her efforts to reach him, and added that "[t]his man is just trying to avoid the inevitable and his appeal should be dismissed" (Pet. App. ~~76a~~ A-75). The notation merely reflected an earlier statement by the trial judge, contained in an order denying a motion of petitioners Elmer and Joan Thomassen (related to their efforts to have the government pay for the transcripts) as follows: "[T]his appeal is frivolous and interposed only for the purpose of delay. Defendants Elmer and Joan Thomassen were in default in the matter and were allowed appearance only as a matter of grace" (Pet. App. A-11).

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
P.O. BOX 547
SAN FRANCISCO, CALIFORNIA 94101

Los Angeles, Calif DATE: March 3, 1980

TO: John Joseph, Matonis, Esq.

FROM: Clerk's Office, U.S. Court of Appeals for the Ninth Circuit; by: Fiona Humphrey, Deputy Clerk Tel. 556-5559

SUBJECT: Failure to Prosecute Appeal
U.S. Court of Appeals Docket Number 79-3562
Short Title *USA* v. *Elmer Thomassen, Joan Thomassen, Rose Horn* et al & *George Thomassen*
COMPANION TO: 79-3596, 79-3783

Our records indicate that you have failed to do the following in a timely manner:

[ ] Pay the U.S. Court of Appeals docket fee in this case

[x] Designate and order (including arrangements for payment) the court reporter's trial transcript

[ ] File an opening brief (including excerpt of record) in this court which meets the standards of FRAP and our Local Rules

[ ] Designate the trial court clerk's transcript

[x] _____
Motion for relief from default required.
_____
_____

Local Rule 19(b) provides:

> "When an appellant fails to timely file the record, pay the docket fee, file a brief, or otherwise comply with the rules requiring processing the appeal to hearing, the clerk will enter an order dismissing the appeal. The clerk will notify each appellant in writing of this provision of the rules."

Unless, within fourteen days from the date of this letter, the above referenced deficiencies are corrected, this appeal may be subject to immediate dismissal under Rule 19(b) of the Local Rules of the Ninth Circuit. If you are in default due to the untimeliness of filing a brief, you must also submit a "motion for leave to file a late brief." This office is of course not at liberty to predict how the court will act upon such a motion.

cc: Court Reporter: Florence Carcia
Counsel for Aple: William James, Ass't U.S. Atty
CA9-009 (10/24/79)

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nov 4 1980

Richard H. Deane
Clerk, U.S. Court of Appeals

United States of America,	)	No. 79-3562
Plaintiff-Appellee,	)	DC# CV 78-1731 MLR Central California
vs.	)	
ELMER THOMASSEN, JOAN THOMASSEN, ROSE HORN, et al., Defendants,	)	
and		
GEORGE W. THOMASSEN,		ORDER
Defendant-Appellant.	)	

Before: ANDERSON and TANG, Circuit Judges

Upon due consideration of appellants' petition and suggestion, the Court issues the following order:

a) the petition for rehearing is denied;

b) the suggestion for rehearing en banc is rejected;

c) appellants are granted an extension of time of twenty-one (21) days from the entry of this order in which to have the certificate of record filed; and

d) appellants' brief shall be filed within forty-two (42) days of the entry of this order.

Mo Cal [8/4/80]